

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH WILLIAM LEE,

Defendant-Appellant.

UNPUBLISHED

March 2, 2006

No. 257076

Wayne Circuit Court

LC No. 04-000395-01

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from the five concurrent sentences of 18 years, 9 months (225 months) to 35 years in prison resulting from his convictions on four counts of first-degree criminal sexual conduct (CSC-I) in violation of MCL 750.520b(1)(a)¹ and one count of CSC-I in violation of MCL 750.520b(1)(b)(ii).² We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The instant case arises from allegations that defendant sexually penetrated his daughter on five occasions between May of 1999 and March of 2002. The acts occurred during the victim's weekend visits to her grandmother's home where defendant resided. The first four incidents took place before, and the final incident occurred after, the victim's thirteenth birthday.

On appeal, defendant contends that the trial court violated his right to due process by incorrectly scoring offense variable four (OV-4) and offense variable ten (OV-10) when determining his sentence. Defendant therefore asserts that the trial court abused its discretion by imposing a minimum sentence of 225 months and requests that this Court remand the case for resentencing.

The proper construction or application of statutory sentencing guidelines presents a question of law that we review de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127

¹ Penetration of person under thirteen years of age.

² Penetration of a person more than thirteen but less than sixteen years of age when the actor is related to the victim by blood or affinity to the fourth degree.

(2001). But a sentencing court has discretion in determining the number of points to be scored under an offense variable, provided that evidence on the record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Under MCL 769.34(10), this Court is required to affirm sentences within the legislative guidelines' range unless the trial court erred in scoring the sentencing guidelines or relied on inaccurate information in determining the defendant's sentence. The facts relied on by a trial court when assessing a particular score under the sentencing guidelines need not have been found by the trier of fact when rendering its verdict. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004); *People v Williams*, 191 Mich App 269, 276; 477 NW2d 877 (1991).³ "Rather, all that is required is that evidence exists that is adequate to support a particular score." *Id.* This Court will uphold a sentencing court's scoring decision if there is any evidence in the record to support it. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003).

Defendant first contends that the trial court erroneously scored OV-4, concerning psychological injury to a victim. MCL 777.34. Under this provision, a defendant receives ten points if the victim suffered a serious psychological injury that "may require professional treatment." *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004) (quoting MCL 777.34[2]; emphasis in original). The statute does not require that the victim actually receive such treatment. *Id.*; MCL 777.34(2). In *Apgar*, this Court held that the mere fact that the victim testified that she was fearful during her encounter with the defendant constituted sufficient evidence to support the trial court's decision to score OV 4 at ten points. *Id.*

In the instant case, the trial court found that, based on her testimony and demeanor while on the witness stand, the victim was suffering from serious emotional or psychological problems because of defendant's actions. It therefore assessed ten points for OV-4. At trial, the victim repeatedly testified that she delayed disclosing what had occurred because she was scared. Further, during her testimony, the trial court had to pause the proceedings because she broke down crying when asked to describe the first sexual assault by her father. As in *Apgar*, sufficient evidence existed to support the trial court's decision. Consequently, we find that the court did not abuse its discretion by scoring ten points for OV-4.

Defendant also asserts that the trial court erred in assessing fifteen points for OV-10, regarding the exploitation of vulnerable victims. MCL 777.40. The statute requires a score of fifteen points if "predatory conduct" was involved in the offense. MCL 777.40(1)(a); *People v*

³ We note that the Michigan Supreme Court granted leave to appeal in *People v Drohan*, 264 Mich App 77; 689 NW2d 750 (2005), lv granted in part 472 Mich 881 (2005), to re-address whether the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), applies to Michigan's sentencing guidelines. Leave was also granted to consider for the first time whether the U.S. Supreme Court's decision in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005) (striking down as unconstitutional that part of the federal sentencing guidelines that made them mandatory for courts to follow), applies to this state's guidelines. To date, the Supreme Court has not released its opinion in *Drohan*.

Kimble, 252 Mich App 269, 274; 651 NW2d 798 (2002). Predatory conduct is defined as “preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a). The statute assigns a score of ten points where

[t]he offender exploited a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status. [MCL 777.40(1)(b).]

Defendant argues that he did not engage in predatory conduct and that the trial court should therefore have only assessed ten points.

In *People v Witherspoon (After Remand)*, 257 Mich App 329, 336; 670 NW2d 434 (2003), this Court held that the trial court did not err in scoring OV-10 at fifteen points under similar circumstances. The nine-year-old victim in *Witherspoon* testified that the defendant, her mother’s boyfriend, approached her and committed a sexual assault when no one else was present and she was folding clothes in the basement. *Id.* This Court held that “the timing of the assault (when no other persons were present) and its location (in the isolation and seclusion of the basement)” constituted evidence of preoffense predatory conduct. *Id.* It further explained that this evidence created an inference that the defendant “*watched* his victim and *waited* for any opportunity to be alone with her in an isolated location.” *Id.* (emphasis in original).

Similarly, the record in the instant case contains some evidence of preoffense conduct directed at the victim. The victim testified that, on one occasion, defendant came upstairs after her grandmother had gone to bed, went into the guest bedroom where the victim was sleeping, and sexually assaulted her. As in *Witherspoon*, this testimony creates an inference that defendant watched the victim and waited for any opportunity to be alone with her in an isolated location. Further, the first incident occurred in the basement of the home after defendant called the victim to come down there—presumably because it was secluded from the rest of the house. Because some evidence exists to support the scoring of OV-10, we must uphold the trial court’s decision to assess fifteen points for the variable. *Spanke, supra* at 647.

Further, we note that, even if the trial court had erred in scoring OV-4 and OV-10, we would not remand for resentencing. Correcting the alleged errors would have only reduced defendant’s offense variable score from seventy-five to sixty points. Under the applicable sentencing grid, MCL 777.62, defendant would have remained at offense variable level IV. Any error that does not affect the total offense variable score enough to change the level of the guidelines’ range constitutes harmless error. *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003); *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

Affirmed.

/s/ Kathleen Jansen
/s/ Jane E. Markey

I concur in result only.

/s/ Jessica R. Cooper